Mike Jacobson, Clayton Lord, Joe Cronkright, Adam Hickson, Carmen Allen, Mike Jarvi, Daryl Johnson, Jack Applekamp, Gary Dinkel, Rick McVey, Jay Wittak, Robert Garrison Sr., Joel Enking.

Wayne Young, Mark Douglas, Donald Kuhr, Randy Bruntjens, John Mattila, Ellis Sutfin, Pat Halefrisch, Debbie Begalle, Terry Popour, Richard Annen, Gerald Mohlman, Chester Sartori, John Krzycki, Robert Burnham, Craig Farrier, John Johnston, Charles Vallier, Robert Ziel, Beverly Current, Jeffery Stampely, Gary Willman, Daniel Laux, Jeffery West, Otto Jacob, Kay Fisher, Jason Tokar, Paul Pierce, Brad Johnson, Jack Maurer, Jim Haapapuro, Byron Sailor, John Turunen, Scott Seberd, Michael Slade, Daniel McNamee, Patrick Olson, Steve Adkins, Pete Davis, Debra Huff, Richard Berkheiser, Roger Grinsteiner, Russ MacDonald, Amy Dover, Paul Gaberdiel, Jeff Noble, Chuck Lanning, Brian Mulzer. ●

REFORM OF NAFTA CHAPTER 19 DISPUTE PROCESS

● Mr. CRAIG. Mr. President, in preparation for renewed consideration of adding countries to the NAFTA and of fast-track legislation for this purpose, it is imperative, in my view, that action be taken to resolve a serious problem with the NAFTA: The NAFTA Chapter 19 dispute settlement system for antidumping duty and countervailing duty appeals.

In August of last year, nine of my Senate colleagues, including the former majority leader and the chairman of the Trade Subcommittee of the Committee on Finance, expressed serious concerns about Chapter 19 in a letter to then-U.S. Trade Representative Michael Kantor.

Mr. President, I ask unanimous consent that this letter be printed in the RECORD at the end of my statement.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit 1.)

Mr. CRAIG. Mr. President, I wish to emphasize that I share the concerns of the authors of this letter and believe that addressing this failed system must be a priority for U.S. trade policy. Under Chapter 19, appeals of determinations that imports are subsidized or dumped into the U.S. market were, for NAFTA countries, transferred from domestic courts to panels of private individuals, which include foreign nationals. The system was introduced in 1988 as a provisional compromise for the United States-Canada Free-Trade Agreement. Although serious reservations were expressed about Chapter 19 at that time, it was accepted on an interim basis with Canada only until disciplines against Canadian subsidies and dumping could be negotiated. Although no such unfair trade disciplines were agreed to, Chapter 19 was, unfortunately, extended to the NAFTA. Its inclusion was a key reason for my vote against that agreement.

Chapter 19's infirmities are several. As the Justice Department indicated in 1988, there are major constitutional problems with giving private panelists—sometimes a majority of whom are foreign nationals—the authority to issue decisions about U.S. domestic law that have the binding force of law. These panelists, coming from different legal and cultural disciplines and serving on an ad hoc basis, do not necessarily have the interest that unbiased U.S. courts do in maintaining the efficacy of the laws as Congress wrote them. Moreover, the ad hoc, fragmented nature of Chapter 19 decisionmaking can lead to contradictory outcomes, even with regard to a single instance of alleged unfair trade.

In practice, Chapter 19 has revealed itself to be unacceptable. A foremost example is the Chapter 19 review of a 1992 United States countervailing duty finding that Canadian lumber imports benefit from enormous subsidies. Three Canadian panelists outvoted two leading United States legal experts to eliminate the countervailing duty based on patently erroneous interpretations of United States law—interpretations that Congress had expressly rejected only months before. Two of the Canadian panelists served despite egregious, undisclosed conflicts of interest. The matter then was argued before a Chapter 19 appeals committee, and the two Canadian committee members outvoted the one United States member to once again insulate the Canadian subsidies from United States law.

The U.S. committee member was Malcolm Wilkey, the former Chief Judge of the Federal Court of Appeals for the D.C. Circuit and one of the United States' most distinguished jurists. In his opinion, Judge Wilkey wrote that the lumber panel decision ''may violate more principles of appellate review of agency action than any opinion by a reviewing body which I have ever read.'' Judge Wilkey and former Judge Charles Renfrew—also a Chapter 19 appeals committee member—have since expressed serious constitutional reservations about the system. While some have claimed that Chapter 19 decides many cases well, its inability to resolve appropriately large disputes, and its constitutional infirmity, demand a remedy.

Like my colleagues who wrote to Ambassador Kantor, I believe that something must be done about Chapter 19. I support returning appellate jurisdiction to the U.S. judiciary where it had long rested and still rests for non-NAFTA countries. Alternatively, Chapter 19 perhaps could be reformed to eliminate its constitutional and practical infirmities. It should, at minimum, be clear to executive branch officials that Chapter 19 cannot be extended to any additional country in its current form, be it Chile or any other NAFTA prospect. I look forward to working diligently in the upcoming Congress to correct this serious problem.

EXHIBIT 1

AUGUST 21, 1995.

Ambassador MICHAEL KANTOR,
Trade Representative, Executive Office of the President, Washington, DC.

DEAR AMBASSADOR KANTOR: In light of the advent of the new trade and dispute settlement rules in the agreements establishing the World Trade Organization (WTO), we are writing to express our concern with the current system for reviewing antidumping and countervailing duty cases under the NAFTA.

As you know, the original intent regarding Chapter 19 was that: 1) it would be limited to Canada and quickly phased out; 2) panelist conflict-of-interest rules would be strictly enforced; and 3) panels reviewing U.S. determinations would be bound, like the U.S. Court of International Trade, by U.S. law and its deferential standard of review.

It is clear that these conditions have not been met. Despite earlier assurances to the contrary, the system was extended to Mexico and effectively made ''permanent'' with respect to Canada and Mexico in the NAFTA. Moreover, the U.S.-Canada softwood lumber case demonstrated serious inadequacies and problems with conflicts of interest and standards of review under the Chapter 19 system.

We believe that because of the intended temporary nature of Chapter 19 and the great controversy it has engendered, the Chapter 19 dispute settlement mechanism should not be extended in future trade agreements to any other country, including the present NAFTA accession negotiations with Chile. This belief is without regard to whether such agreements should be concluded.

Under Chapter 19, ad hoc panels of private individuals rule in place of judges on whether antidumping and countervailing duties have been imposed consistent with the domestic law of the importing country. This requires Chapter 19 panels to interpret and apply national law itself, rather than resolving disputes over the interpretation of international agreements as would normally occur in international dispute settlement like the WTO. These panel decisions are automatically implemented without judicial or political review of accountable government officials.

In light of the WTO's new binding international dispute settlement process, and the Uruguay Round's new agreements on subsidies and dumping, we question the need for a special NAFTA trade remedy. It is our belief, especially in light of past experience, that disputes about U.S. law are best left to the U.S. Court system.

Absent an outright elimination of Chapter 19, which we would certainly consider in a favorable light, substantial attention should be given to reforming Chapter 19 with respect to the current NAFTA. The United States should not agree to extend this fundamentally flawed system to any other country. We trust that you will consider our suggestion in your ongoing negotiations with Chile, and urge increased consultation with the Congress during the process.

We appreciate your consideration of this important matter.

Sincerely,

MAX BAUCUS, DAVID PRYOR, JOHN ROCKEFELLER, JOHN BREAUX, KENT CONRAD, CHUCK GRASSLEY, BOB DOLE, ORRIN HATCH, ALFONSE D'AMATO.●

TRIBUTE TO SHERRY KOHLENBERG

Mr. WARNER. Mr. President, exactly 2 weeks ago on September 16, I was privileged to join with Virginia's First